In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 865

ROBERT R. FRANK, PETITIONER

v.

LAURIE W. TOMLINSON, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–2) is reported at 351 F. 2d 384.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1965. The petition for a writ of certiorari was filed on December 31, 1965. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly held that, in the circumstances of this case, documents pertaining to

trust accounts handled by an attorney, other than communications between the attorney and his clients, are not within the attorney-client privilege.

STATEMENT

Petitioner is an attorney whose personal income-tax returns for 1959–1962 are being investigated by the Internal Revenue Service (R. 1–3).[1] On June 19, 1964, an Internal Revenue summons was served on petitioner directing him to produce books and records pertaining to trust accounts handled by petitioner and his law partnership. The summons specifically enumerated the following documents: copies of written instruments for the trusts, bank statements, cancelled checks, general journals, ledgers and cash books disclosing receipts, disbursements, payables and receivables of the trusts (R. 5).

On July 27, 1964, petitioner and his attorney appeared with the records before the investigating agents (R. 10–12). Petitioner's attorney stated that the documents could not be "indiscriminately turned over without violating the Attorney-Client privilege" and requested an assurance that information contained therein would not be used against any person who was, or had sought to become, a client of petitioner's (R. 12–13). The request was refused (R. 13). In answer to petitioner's inquiry whether any specific record was sought, the investigating agent responded, "We can use everything. Whatever records are necessary to show that it isn't your income" (R. 14). The agent then stated that "[w]e are interested in determining the source of funds deposited in those

[1] "R." refers to the printed record in the court of appeals.

bank accounts," and petitioner's counsel replied that "that might be a violation of the Attorney-Client privilege" (R. 15).

The following colloquy ensued (R. 16–17):

> WEINSTEIN [petitioner's counsel]. He will, of the pile currently on the table, the Taxpayer is ready to extract, and make available for your information, any of the same which will reflect income of himself or the Frank & Weston partnership.
>
> MORGAN [the Internal Revenue agent]. We are interested in two bank accounts.
>
> WEINSTEIN. We do not feel that the Bank Accounts can be turned over generally without violating privilege.
>
> MORGAN. We are interested in the two trust accounts.
>
> WEINSTEIN. The source might be a violation of Attorney-Client privilege.
>
> * * * * *
>
> MORGAN. As he determines, but I want to determine the source of the funds of the Trust Accounts. Is he willing to turn these over?
>
> WEINSTEIN. No.
>
> * * * * *

In a proceeding to enforce the summons, petitioner again asserted that indiscriminate disclosure of the requested records could violate the attorney-client privilege (R. 9). The district court held that the privilege did not attach to records showing the names of petitioner's clients or property which such clients had in petitioner's hands. The court thereupon ordered petitioner to produce the designated records "excluding, however, copies of any privileged com-

munications" between petitioner and his clients (R. 20). The court of appeals affirmed *per curiam*.

ARGUMENT

This case involves a general assertion of the attorney-client privilege by petitioner to bar any disclosure of trust-account records relevant to an investigation of his own tax returns. On the record before it, the district court correctly rejected, in part, the claim of privilege, and its ruling, affirmed summarily by a unanimous court of appeals, does not conflict with any other decision and does not warrant further review.

1. The summons served on petitioner sought disclosure of books and records pertaining to accounts which petitioner and his law partnership were holding as trustees. Most of these records were clearly not the sort of documents to which the attorney-client privilege applies because they involved petitioner's participation as a fiduciary and not as a legal counselor. To the extent, for example, that petitioner had custody of bank statements, cancelled checks, and accounting ledgers—documents which were demanded by the Internal Revenue Agent (pp. 2–3, *supra*)—he was not acting in a capacity which is protected by the attorney-client privilege. See 8 Wigmore, *Evidence* (McNaughton rev. 1961), Section 2296; *Radiant Burners, Inc.* v. *American Gas Ass'n*, 320 F. 2d 314, 324 (C.A. 7), certiorari denied, 375 U.S. 929; *Olender* v. *United States*, 210 F. 2d 795, 806 (C.A. 9); *Pollock* v. *United States*, 202 F. 2d 281, 286 (C.A. 5),

certiorari denied, 345 U.S. 993; *United States* v. *Chin Lim Mow*, 12 F.R.D. 433 (N.D. Cal.).

2. Moreover, on the record before it, the district court had no basis on which to sustain a claim of privilege resting on alleged disclosure of a client's identity. It is well-established that "'the burden is on the objector to show that the relation' giving rise to the privilege existed." *United States* v. *Kovel*, 296 F. 2d 918, 923 (C.A. 2). While petitioner's counsel stated that the "source" of the trust accounts "*might* be a violation of Attorney-Client privilege" (R. 16, emphasis added), neither petitioner nor his attorney ever stated explicitly that the settlor of the trust was a client of petitioner's and that his identity could not be known from the non-privileged documents pertaining to the trusts in petitioner's possession.

It is insufficient, we submit, for an attorney to assert that disclosure of documents "might" violate the attorney-privilege because they may disclose the identity of a client. If such a claim were sustained, an attorney could bar all lawful investigative demands by invoking the privilege on behalf of hypothetical clients. Assuming *arguendo* that the identity of a client is, under appropriate circumstances, within the attorney-client privilege (see p. 6, *infra*), the existence of the underlying attorney-client relationship must be proved by more than the generalized statements made here.

3. In any event, the only information disclosed under the district court's order are the names of the

trust's settlor and beneficiaries and whatever information appears in the accounting records kept by petitioner. The latter are, for reasons previously stated (p. 4, *supra*), outside the attorney-client privilege. And the general rule is that the identity of a client is not protected by the privilege. See *Colton* v. *United States,* 306 F. 2d 633, 637 (C.A. 2), certiorari denied, 371 U.S. 951; 8 Wigmore, *Evidence* (McNaughton rev. 1961), Section 2313. *Baird* v. *Koerner,* 279 F. 2d 623 (C.A. 9), and *Tillotson* v. *Boughner,* 350 F. 2d 663 (C.A. 7), upon which petitioner relies, are distinguishable from the present case. In both cases, an attorney had paid taxes due on behalf of an anonymous client, and disclosure of the client's identity would have revealed consciousness of guilt—an incriminating circumstance—on the part of the client. The court in *Baird* acknowledged, however, that whether the privilege should encompass the client's identity depended on a balance of conflicting policies which had to be made on the facts of each individual case. See 279 F. 2d at 631–632. The court approved, in that case, of the decision in *Mauch* v. *Commissioner,* 113 F. 2d 555 (C.A. 3), which was much closer to the facts involved here, and in which the claim of privilege with respect to the identity of an attorney's clients was rejected. When, as here, there is no direct danger of incriminating the client whose identity is disclosed and the privilege is not asserted with particularity, it is appropriate to strike the balance, as the court did in *Mauch,* in favor of disclosure.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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